Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

STACY ANN PATTERSON,

Petitioner,

v.

AFSCME # 2456,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This case presents important issues of law involving the burden of proof in an adverse employment action involving discrimination and a union failing to properly investigate and act in conformance with their obligations. The Third Circuit created a dangerous precedent against public policy dismissing the obligation of a union to protect employees in a hostile working environment.

Due process requires investigation. The Petitioner alleged and submitted over 300 pages of documentation evidencing discrimination due to her disability and gender, and the Union failed to act effectively and promptly with respect to the allegations. The Union's motion for summary judgment was wrongfully granted since there existed material disputed facts as to whether the Union's failure to act and investigate met due process. Given the pattern of behavior, the Union should have properly represented the Petitioner during hearings, not force her to accept settlements that were unfavorable, not pressure her to accept positions that she was not qualified for, and follow procedures to represent a union-paid employee. The Union decided without justification not to proceed in arbitration and make prejudicial decisions with the Petitioner's grievances. When the Union realized it had erred in handling the complaints and in retaliation of allegations that the Union was failing to investigate the discriminatory practices, it dismissed its paying member. The Un-

ion allegedly represents more than 45,000 people throughout the country. This Court must accept the Writ so that a uniformed policy of the Union's duties to meet due process can be established.

If the Writ is denied, then the standard for summary judgment would be liberalized in employment cases, and the purposes of unions to protect their paid members from discriminatory practices would be undermined, clearly against public policy. Thus, the Writ must be granted to address this salient issue.

I. WHETHER THE THIRD CIRCUIT DEVIATED FROM SUPREME COURT STANDARDS AND VIOLATED THE PETITIONER'S RIGHT TO A JURY TRIAL AFTER SHE SUBMITTED SUBSTANITAL EVIDENCE AT THE SUMMARY JUDGEMENT STAGE TO MEET HER BURDEN OF PROOF THAT THE UNION FAILED TO INVESTIGATE AND PROPERLY REPRESENT THE PETITIONER WITH HER SUBSTANTIATED ALLEGATIONS THAT HER EMPLOYER VIOLATED THE AMERICANS WITH DISABILITIES ACT, TITLE VII AND PENNSYLVANIA HUMAN RELATIONS ACT IN VIOLATION OF HER CONSTITUTIONAL RIGHTS?

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The United States Court of Appeals for the Third Circuit's Judgment and Opinion dated March 26, 2009 is set forth in the Appendix. (3a-4a).

The Petitioner's Petition for Rehearing En Banc before the Third Circuit was denied on April 23, 2009 and is set forth in the Appendix. (1a-2a).

This Writ is timely filed.

STATEMENT OF THE BASIS OF JURISDICTION

OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Third Circuit issued its final decision on March 26, 2009. (3a-4a). A Petition for Rehearing En Banc was denied on April 23, 2009. (1a-2a).

This Petition is timely filed.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

CONSTITUTIONAL PROVISIONS

Seventh Amendment, United States Constitution:

n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and not fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

Fourteenth Amendment, United States Constitution:

The Due Process Clause of the Fourteenth Amendment provides that no State "shall ... deprive any person of life, liberty, or property, without due process of law...."

STATUTORY PROVISIONS

42 U.S.C. Section 1983, Civil Rights

Section 1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage...subjects, or causes to be subjected,...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

42 U.S.C. Section 2000e-2:

Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, et. seq. 42 U.S.C. Section 2000e provides:

> **Section 2000e. Unlawful employment practices**

Employer practices. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color.

Title I of the Americans with Disabilities Act ("ADA") 42 U.S.C. §12112(a)

"a qualified individual with a disability because of the disability of such individual in regard to...hiring, advancement, or discharge."

STATEMENT OF THE CASE

Procedural History

Stacy Ann Patterson, the Petitioner, (hereinafter referred to as "Petitioner"), filed a complaint in the United States District Court for the District of Pennsylvania against AFSCME 2456, the Respondent, (hereinafter referred to as the "Union"), on May 25, 2007 citing sufficient facts to prove violations of the Pennsylvania Human Relations Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act.[1]

The Union denied the allegations in an Answer dated August 3, 2007. Later, on February 6, 2008, the Union filed a Motion for Summary Judgment alleging that the Petitioner could not meet her burden of proof as a matter of law.

The Petitioner filed at first a partial response to the motion and then an Opposition stating sufficient facts to overcome her burden of proof. On May 14, 2008, the District Court granted the Union's Motion for Summary Judgment. Thereafter, the Petitioner

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[1] The Petitioner had complied with the administrative process of filing a complaint with the EEOC as well as the Pennsylvania Human Relations Commission.

filed a Notice of Appeal on May 28, 2008 to the Third Circuit Court of Appeals.

On March 26, 2009, the Third Circuit affirmed the District Court's decision. The Petitioner filed a Petition for Rehearing. On April 23, 2009, the Third Circuit denied the Petition.

Therefore, given the constitutional and public policy issues involved in this case, the Petitioner files this Writ and seeks relief.

STATEMENT OF FACTS

The Petitioner was hired by the Pennsylvania's Commission on Crime and Delinquency, where she became a union dues payor. Then the Petitioner began a position at the Office of Inspector General (the "Employer"), on January 18, 2000, as an Information Technology Technician. Her union was the Respondent.

When she was hired, the Employer and the Union were informed of the Petitioner's perceived disability was hydrocephalus. The perceived disability caused damage to her right optic nerve and she has no depth perception. Also, due to an accident in 1998, the Petitioner suffered from a mental impairment.

Even after she was hired, in January of 2000, the Petitioner notified her immediate supervisor at the time, Berney Ortiz, of her perceived disability. Several months later in April 2000, the Petitioner again

notified Mr. Ortiz as well as her team leader Dennis Lauer of her perceived disabilities. The Employer assigned tasks to the Petitioner that required memory tasks that were difficult due to her perceived disability as well injuries from her car accident.

While employed, the Petitioner often asked her Employer how to complete certain tasks and requested training; she also sought interests in other positions within the Employer. Even though other employees were provided training, the Petitioner was denied all requests.

Approximately a year later in March 2001, the Petitioner notified her bureau director, Michael Hayes, who had just become her acting immediate supervisor pending the results of the internal investigation Mr. Hayes had started when the Petitioner blew the whistle on March 12, 2001. Thereafter in November 2001, she notified her then current supervisor, Bill Barrett, of her perceived disabilities.

Unfortunately, the Union never responded or investigated into the claims. Even though the Union knew of her perceived disabilities, Ron Aitken repeatedly told Patterson that she should worry most about staying employed and that staying employed was easier to if she was "not on the outside looking in." The Union intentionally offered Patterson new positions of clerk and other demotion positions where the Union knew that she could not perform given her disabilities.

Moreover, the Petitioner was never promoted as an employee of the Pennsylvania commission on Crime and Delinquency, which she began in February 1996 as an Information Technology Technician. The Petitioner commenced as a computer Systems Analyst 1. Unfortunately, on April 7, 1998, the Petitioner was involved in a severe motor vehicle accident; her injuries included head and mental injuries. Five months after the accident, the Petitioner was able to return only part time and then partial days. The Petitioner returned at first part-time in August of 1998 and starting the last week of October of 1998 was working again on a full-time basis. Upon her return, the Petitioner became pregnant. Her supervisor also retired near the same time.

When she returned to work, the Petitioner's department had been shifted to a different section and she had a new supervisor, Linda Rosenberg, who hired an intermediate supervisor between her and the Petitioner. Suddenly, only the Petitioner was being timed for breaks – no other employee. As a result, the Petitioner filed a grievance, and once again, the grievance never got heard. The Union encouraged the Petitioner to keep bidding on other open positions instead of investigating the merits of her complaint.

In 1998, the Petitioner's position was newly classified as Information Technology Technician in order

to better describe the areas of specialties in the technology field. With the reclassification that became official in 1999 every single person in the department got a pay raise and new titles, even other employees who did not have the experience under certain titles.

When the Petitioner received a performance review of "needs improvement", the Petitioner filed a grievance which once again did not get heard because she received a new position. In order to avoid the investigation of crucial facts and patterns of behavior, the Union would fail to act and just assist in finding the Petitioner a new position.

When the Union realized it had erred in handling Patterson's complaints, then it dismissed its paying member. On August 22, 2003, the Union issued a letter stating that the Petitioner's grievances were denied by the Union's State Committee Panel with no other explanation.

Even though she continuously notified her superiors of her perceived disabilities, the Petitioner was denied training necessary to satisfactorily complete her duties. As a result, she was given unsatisfactory reviews.

Moreover, from January 2000 to March 2001, Mr. Ortiz, her former supervisor, sexually harassed the Petitioner and forced her to have a sexual relationship with him. After the Petitioner signed her first official job description in November 2000, Mr. Ortiz

began issuing unsatisfactory interim performance reviews. After the Petitioner received two unsatisfactory interim performance reviews as well as an unsatisfactory annual performance review, the Petitioner reported the sexual harassment to Mr. Hayes in March of 2001. Even though Mr. Hayes was allegedly conducting an investigation, the Petitioner was being denied training in order to conduct her duties. The Petitioner's co-workers were not denied training.

In order to be promoted and reclassified to a Distributed Systems Specialist I, as were her co-workers, the Petitioner would have had to attend training seminars. However, the Employer failed to allow her to be trained, and thus, she could not be promoted or perform her duties properly as her co-workers did. She consistently received unsatisfactory ratings.

Ron Aitken, the Union's chief steward, had encouraged the Petitioner to try to transfer to the Employer. The Petitioner notified Mr. Aitken that she was being denied training and that other employees were being promoted antrained to perform their duties. During her membership with the Union, the Petitioner filed at least eight grievances with great detail. Unfortunately, the Union never responded or investigated into the claims. The following claims were filed by the Petitioner with the Union:

DATE	GRIEVANCE NUMBER	GRIEVANCE
11/6/01	1365	Improper classification
2/6/02	1385	Disputing written reprimand (which was later withdrawn)
6/14/2002	1407	Disputing a one day suspension under Article 28-1; no further explanation was provided
8/5/2002	1421	Disputing a suspension and then not receiving a fair hearing or being notified of the purpose of an alleged first hearing
10/4/2002	1464	After an unfair hearing in February 2003, the Union committee was deadlocked as to whether Patterson was terminated for cause

12/2001		The Union attempted to force Patterson into a settlement regarding a reprimand and then did settle the matter against Patterson's wishes
5/13/2002		Union representative refused to file a grievance against the Employer after Patterson's supervisor changed evaluation process without notice and in violation of the union contract
		Union coerced Patterson into to accepting a settlement of a demotion of a job title in which Patterson did not have the requisite skills

Throughout the numerous grievance processes, the Petitioner notified the Union of her disability and her medical conditions that affected her job training and performance. Even though the Union knew of her disabilities, Ron Aitken repeatedly told the Petitioner that she should worry most about staying employed and that staying employed was easier to if she was "no on the outside looking in." The Union intentionally offered the Petitioner new positions of clerk and other demotion positions where the Union knew that she could not perform given her disabili

ties. Instead of representing the Petitioner with valid grievances against her Employer, which the latter was supposed to do given that she paid dues, the Union failed to represent the Petitioner during grievance processes and forced her to accept lesser than desired resolutions. Furthermore, on July 30, 2003, the Union notified the Petitioner that they would cease representing her in her grievances against the Employer. The Union decided without justification not to proceed in arbitration and make prejudicial decisions with the Petitioner's grievances.

On August 22, 2003, the Union issued a letter stating that the Petitioner's grievances were denied by the Union's State Committee Panel with no other explanation.

Since her wrongful termination, the Petitioner has not been added to civil service lists and has been wrongfully prevented to apply for positions. When the Petitioner was able to submit an application, she received rejection letters without any explanation, especially since she was qualified for the positions. However, the "mark" on her record has continuously caused damage and missed opportunities.

As a result of this pattern of behavior, the Petitioner filed a complaint with the Pennsylvania Human Relations Commission as well as the Equal Employment Opportunity Commission. Since she was denied relief with both Commissions, the Peti-

tioner timely filed a Complaint in the United States District Court.

ARGUMENT IN WRIT OF CERTIOARI

I. THE THIRD CIRCUIT DEVIATED FROM SUPREME COURT STANDARDS AND VIOLATED THE PETITIONER'S RIGHT TO A JURY TRIAL AFTER SHE SUBMITTED SUBSTANITAL EVIDENCE AT THE SUMMARY JUDGEMENT STAGE TO MEET HER BURDEN OF PROOF THAT THE UNION FAILED TO INVESTIGATE AND PROPERLY REPRESENT THE PETITIONER WITH HER SUBSTANTIATED ALLEGATIONS THAT HER EMPLOYER VIOLATED THE AMERICANS WITH DISABILITIES ACT, TITLE VII AND PENNSYLVANIA HUMAN RELATIONS ACT IN VIOLATION OF HER CONSTITUTIONAL RIGHTS.

Introduction

The Writ before this Honorable Court has exceptional purpose given the Union's failure to represent a due-paying member during hearings, forced her to accept settlements that were unfavorable, pressured her to accept positions that she was not qualified for, and failed to follow procedures to represent a union-paid employee. The lower courts erroneously placed

an impermissible and unconstitutional burden upon the Petitioner at the summary judgment stage. This Honorable Court's review is necessary to resolve the issue of the burden of proofs when a union failed to interfere and investigate into numerous discrimination claims and pressurized the Petitioner in attempting to take less desirable working conditions. Still, the Petitioner is being denied positions through civil service due to her whistle blow of the Employer's and Union's lack of prosecution of a sexual assaultor in the workplace.

The purpose of the Union was to properly investigate the numerous complaints of discrimination and retaliation. The Union's failure to properly act was a violation of the Petitioner's due process. Moreover, the Third Circuit and District Court misapplied the burden of proof at the summary judgment stage resulting in a violation of the Petitioner's right of not having a jury trial.

Of course such issues are of exceptional importance since the Petitioner has been victimized twice – once by suffering from known disabilities and second by suffering at her workplace due to her disabilities with no protection or investigation by the Union. The Union represents over 45,000 employees across the country. The Third Circuit and District Court failed to impose any standard or duty upon the powerful Union to investigate and pursue unlawful employers' practices.

This Writ encompasses such important public policy and constitutional issues that must be reviewed by this Honorable Court.

a). There was sufficient evidence to overcome the standard of a motion for summary judgment.

The lower courts failed to abide by the rules of civil procedure (Fed.R.Civ.P. 56) as well as pertinent case law established by this Court. Summary judgment was proper only if it appears "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure. There existed genuine issues of disputed material facts as to whether the Union's reasons were legitimate in failing to investigate discriminatory and retaliatory practices of the Employer. The lower court failed to use the proper standard of review and assess all factual evidence and draw all reasonable inferences in favor of the Petitioner. *Cline v. Catholic Diocese of Toledo*, 206 F.3d 6512, 657 (6th Cir. 2000).

F.R.Civ.P. 56(c) states that a court may grant summary judgment only if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits show that "there is no genuine issue as to any material fact and that the

moving party is entitled to a judgment as a matter of law." *Id.* In making this assessment, the Court must "accept all reasonable inferences favorable to the nonmovant." *Feliciano v. State of Rhode Island,* 160 F.3d 780. 788 (1st Cir. 1998). In deciding whether a factual dispute is "genuine," the Court must determine whether the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.*; *see also Fajardo Shopping Center, S.E. v. Sun Alliance Ins. Co. of Puerto Rico, Inc.*, 167 F.3d 1, 7 (1st Cir. 1999); *De-Jesus-Adorno v. Browning Ferris Indus. Of Puerto Rico,* 160 F.3d 839, 841-842 (1st Cir. 1998) ("A trial worthy issue exists... [if] the evidence is 'sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side.'"); *Feliciano* at 784; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25, 106 S.Ct. 2548 (1986). In weighing whether a factual dispute is "material," the Court must examine the substantive law of the case, because "only disputes over the facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment." *Anderson* at 248; see also *De-Jesus-Adorno* at 841-42 ("A trialworthy issue exists if the evidence is such that there is a factual controversy pertaining to an issue that may affect the outcome of the litigation under the governing law.") In our facts, trialworthy disputed material facts existed, that is, whether the Union's decisions were based upon discriminatory practices and pressure from the Employer not to in

vestigate and participate fairly in arbitration hearings.

Given the numerous complaints and all the inferences drawn in her favor, the Petitioner met her burden of proof. In order to avoid due process, the Union dismissed her.

This Court must accept this Writ to address such important public policy issues of due process investigations in the workforce of serious discrimination and retaliation cases.

b) The Petitioner met her burden of proof that the Union violated Title VII.

The Petitioner met her burden of proof that the Union violated Title VII and thus she is entitled to damages. A union must be held accountable when it fails to protect employees from Employer's known discriminatory practices. Title VII of the 1964 Civil Rights Act prohibits "discrimination... because of...gender". *Oncale v. Sundowner Offshore Services*, 66 U.S.L.W. 4175 (U.S. March 5, 1998). For claims such as the Petitioner's which lack direct evidence of intent to discriminate, the well-established *McDonnell Douglas/Burdine*[2] burden-shifting framework

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[2] In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the Supreme Court

applies to claims of discrimination brought under Title VII. *McClain v. NorthWest Community Corrections Center Judicial Corrections Bd.*, 440 F.3d 320, 332 (6th Cir. 2006)(citing *Mitchell* v. *Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992))(referencing *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)). "To demonstrate a prima facie case, the plaintiff must show that '(1) he or she was a member of a protected class; (2) he or she suffered an adverse employment action; (3) he or she was qualified for the position; and (4) he or she was replaced by someone outside

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established the standard necessary for a claimant to establish a prima facie case of discriminatory treatment under the evidentiary framework in Title VII of the Civil Rights Act of 1964 cases, the plaintiff must prove that: (1) he/she belongs to a racial minority; (2) he/she applied and was qualified for a job for which the employer was seeking applicants; (3) despite the plaintiff's qualifications, the plaintiff was rejected; and (4) after such rejection, the position remained open and the employer continued to seek applicants from persons of the plaintiff's qualifications. Once the plaintiff has met this initial burden, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the plaintiff's rejection; if the trier of facts finds that the elements of the prima facie case are supported by a preponderance of the evidence and the employer remains silent, then the court must enter judgment for the plaintiff. *Id.*

the protected class or was treated differently than similarly-situated, non-protected employees.'" *Wright* v. *Murray Guard, Inc.*, 455 F.3d 702, 707 (6th Cir. 2006). The burden then shifted to the Union to articulate a legitimate, nondiscriminatory reason for the Patterson's termination. *McClain*, 440 F.3d at 332. If the Union articulated such a reason, the burden returns to the Petitioner to produce evidence from which a jury could find that the Union's stated reason is not credible and is a mere pretext for discrimination. *Tysinger* v. *Police Dept. of City of Zanesville*, 463 F.3d 569, 576 (6th Cir. 2006). However, there was no justified reason prospered by the Union, so the burden never shifted back to the Petitioner. Not only did the Employer discriminate against her due to her gender, known disabilities and retaliatory acts, the Union discriminated against the Petitioner as well by not investigating and defending her interest.

The Union failed to push for disciplines to be removed from the Petitioner's employee record. Instead, the Union just tried to downgrade the disciplines. The Union failed to properly represent the Petitioner during hearings, forced her to accept settlements that were unfavorable, pressured her to accept positions that she was not qualified for, and failed to follow procedures to represent a union-paid employee. Given the pattern of behavior of the Employer that was adopted by the Union by refuting the Employer's practices, the Union committed unlawful

acts. Even after her unlawful termination, the Employer and Union have rejected the Petitioner's application for civil service employment and have refused to place her name on lists to apply for positions.

In the case *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000), this Court held that once the *McDonnell* criteria for establishing a prima facie case have been met, then the employer must come forward with a legitimate, non-discriminatory basis for its actions. If the employer's explanation is found not to be credible, then a finding of unlawful discrimination may be sustained, and the claimant does not need to produce further evidence of discriminatory intent. The Supreme Court justified its decision by stating that once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. *Id.*

Under the *Reeves* standard, once the Petitioner met the four *McDonnell* criteria, then if the Court finds that the Union's explanation of its actions not to be credible, there must be a finding of discrimination. There is no more shifting of burdens of proof and persuasion back to the Petitioner. The Union cited unsubstantiated and conflicting reasons for the termination. Proof that the Union's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional dis

crimination even though it is persuasive. *St. Mary*, at 517. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. *Wright v. West*, 505 U.S. 277, 296, 112 S.Ct. 2482 (1995). As emphasized, it is the trier of fact, and not the judge on a summary judgment motion, to weigh the credibility of the explanation.

If given the opportunity, the Petitioner would submit substantial evidence to discredit any proffered reason that discrimination was more likely than not a motivating or substantial cause of the adverse action. *See Fuentes v. Perskie*, 32 F.3d 759, 764 (3rd Cir. 1994); *Torre v. Casio, Inc.*, 42 F.3d 825, 830 (3rd Cir. 1994). Determinations of motive and intent, particularly in discrimination cases are questions better suited for the jury. *Petitti v. New England Telephone and Telegraph Co.*, 909 F.2d 28, 34 (1st Cir. 1990). Employment discrimination cases should be disposed of at summary judgment only with "extreme caution". *See Beard v. Annis*, 730 F.2d 741, 743 (11th Cir. 1984). The Union's explanation of its legitimate reasons must be clear and reasonably specific. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 250 (1981). In our case, the reasons are boilerplate.

Discrimination can be proved with direct or indirect evidence. *Meeks v. Computer Data Association International*, 15 F.3d 1013, 1019 (11th Cir. 1994);

including presenting a statistical pattern in the actual workplace where the discrimination occurred. *Earley v. Champion International Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990). The Petitioner showed a pattern of discriminatory actions against her. A statistical evidence of pattern of discrimination coupled with other evidence is a pretext for an employment discrimination case. *Bell v. Bolger*, 708 F.2d 1312 (1983). The statistical pattern is direct evidence that overcomes the standard for a motion for summary judgment. *See Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011 (1999). When there is evidence of disparate treatment as well as other circumstantial evidence, there is sufficient evidence of proof of pretext discrimination; the evidence does not need to reach the degree of certainty required of plaintiffs who present no proof of discrimination besides disparate treatment. *Scott v. County of Ramsey*, 180 F.3d 913 (1999). The lower courts deviated from the standard and denied the Petitioner remedy. Given the severity of the allegations of discrimination, the Union's motive was central to the case. Employment discrimination cases should be disposed of with dismissal only with "extreme caution". *See Beard v. Annis*, 730 F.2d 741, 743 (11th Cir. 1984).

To constitute an adverse employment action, an act must result in a loss in pay or benefits, a detrimental change in responsibilities, a negative change in the terms and conditions of employment, or some such actual and unfavorable change in job status.

Birone v. Indian River Sch., 145 F.3d 1329 (1998). To this day, the Petitioner is denied employment opportunities and training due to the Union's failure to investigate and its own discriminatory practices of representing a member.

C) The Petitioner met her burden of proof under the Americans with Disabilities Act that since the Union knew of her disabilities then it had to protect her of known violations.

The Union knew of the Petitioner's disabilities and should have taken acts to protect her in the workforce and not subject her to unfavorable positions. Title II of the Americans with Disabilities Act (ADA), prohibits a qualified individual with a disability from being excluded from participation in or being denied the benefits of the services, programs, or activities of a public entity, or being subjected to discrimination by any such entity because of the individual's disability, was a congruent and proportional means of preventing and remedying the unconstitutional discrimination that Congress found to exist both in education and in other areas of governmental services, many of which implicated fundamental rights, and thus, Congress acted within its Fourteenth Amendment authority in abrogating sovereign immunity under Title II of the ADA. U.S.C.A. Const.Amends. 11, 14; Americans with Disabilities

Act of 1990, §§ 2(b)(4), 202, 42 U.S.C.A. §§ 12101(b)(4), 12132; 42 U.S.C. § 12131.

To succeed on a claim under Title II, the Appellant must demonstrate: (1) she is a qualified individual; (2) with a disability; (3) she was excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or was subjected to discrimination by any such entity; (4) by reason of his disability. Wagner v. Fair Acres Geriatric Ctr, 49 F.3d 1002, 1009 (3rd Cir. 1995); 42 U.S.C. §12132.

The Act requires that the Petitioner show that she has an impairment that substantially limits at least one major life activity. See Doe v. County of Centre, PA, 242 F.3d 437, 447 (3d Cir.2001). See 29 C.F.R. § 1630.2(i) (giving examples of major life activities as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working").

In Bowers v. National Collegiate Athletic Association, 475 F.3d 524 (2007), the Circuit Court denied summary judgment and reasoned that there existed genuine issues of material fact as to whether the plaintiff-athlete was a qualified individual with a disability ADA claim. A court must look at the genuine issues of material fact as to whether, by virtue of his drug use, student athlete was not a qualified individual with a disability during relevant time period precluded summary judgment on athlete's

action against National Collegiate Athletic Association (NCAA) and universities, alleging that denial of academic eligibility for college sports based on his failure to take required core courses in high school violated Americans with Disabilities Act and Rehabilitation Act. Rehabilitation Act of 1973, § 504(a), 29 U.S.C.A. § 794(a); Americans with Disabilities Act of 1990, §§ 202, 302, 42 U.S.C.A. §§ 12132, 12182.

The Third Circuit and District Court never considered the Petitioner's claim of ADA violations. The Union must be held responsible to investigate and pursue the allegations to the Petitioner's benefit. By failing to do so, the Union must be held in concert liability with the Employer. This Honorable Court must accept this Writ given the breadth of the Union within the workforce. If the Union treats a known disabled and sexually harassed employee such as the Petitioner without proper hearings and fair representation, this Court must interject on behalf of public policy to establish a process that renders non-arbitrary hearings with due process requirements.

D) The Union violated the Pennsylvania Human Relations Act.

The Pennsylvania Human Relations Act states, in pertinent part: "[i]t shall be unlawful discriminatory practice ··· (a) [f]or any employer because of the race [or] color ··· of any individual ··· to refuse to hire or employ or contract with, or to bar or to discharge from employment····" In order to prima facie estab-

lish a hostile work environment under the Act, a complainant must demonstrate that he: (1) suffered intentional discrimination because of his race or gender, (2) the harassment was severe or pervasive and regular (3) the harassment detrimentally affected him, (4) the harassment would detrimentally affect a reasonable person of the same protected class, and (5) the harasser was a supervisory employee or agent. 43 P.S. § 955(a)[3]; Barra v. Rose Tree Media Sch. Dist., 858 A.2d 206, 215 (Pa.Cmwlth.2004).

U.S. Supreme Court's holding that a civil service employee must be given notice for specific cause and an opportunity to be responded prior to termination Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). A removal notice must be framed in a manner which enables the employee to discern the nature of the charges and to prepare adequately her defense. Chavis v. Philadelphia County Board of Assistance, 29 Pa. Commw. 205. 208, 209, 370 A.2d 445, 447 (1977).

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[3] The Act is generally applied in accordance with Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. Thus, Pennsylvania courts may look to Title VII precedents when interpreting the Pennsylvania statute. *Bailey v. Storlazzi*, 729 A.2d 1206, 1211 n. 6 (Pa.Super.1999); *see also Chumill v. City of Pittsburgh*, 488 Pa. 470, 491, 412 A.2d 860, 871 (1980) ("harmonizing" the Act and Title VII together).

The Petitioner was wrongfully removed from her positions and was forced into inferior positions or positions that she was not qualified to perform.

E) By dismissing her claim, the Petitioner's due process rights have been violated.

This case deals with the Petitioner's property interest (i.e. her reputation and profession) that must be protected by the state under the United States Constitution. By having her case dismissed, the Petitioner's due process rights were violated – she did not have a full investigation of her claims in either the grievance process and now through the litigation process.

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. Dimick v. Schiedt, 293 U.S. 474, 486 (1935); Chauffeurs, Teamsters and Helpers v. Terry, 110 S.Ct. 1339, 1344-45 (1990). So vital is this great constitutional right that "it is only in exceptional cases and for specific causes that a party may be deprived of it. Grand Chute v. Winegar, 82 U.S. 373, 375 (1872); Jacob v. New York City, 315 U.S. 752, 752-753 (1942).

The right of jury trial in civil cases at common law is a "...right so fundamental and sacred to the citizens that it should be jealously guarded by the courts". Id. The jury trial is not merely a procedural device, but, a fundamental right and an essential element of self government which the drafters of the Bill of Rights sought to preserve. To safeguard that right from judicial usurpation, the Seventh Amendment prohibits federal courts from taking away the role of the jury.

The Petitioner's case must fall to the jury in order to preserve her substantive right of the opportunity to be heard due to the allegations of violation of discrimination by the Union. Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 195, 103 S.Ct. 2706, 2709, 77 L.Ed.2d 180 (1982); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). Her claims have such significance— her lost of benefits, wages, status, reputation and professional well-being. In fact, as stated above, the Petitioner has received rejection letters from the civil service even though she qualified for numerous positions. The Union and Employer have intentionally refused to allow the Petitioner to be added to Civil Service lists since her wrongful discharge.

The fundamental requisite of due process is the opportunity to be heard. Applying the fundamental principles of due process, it is readily apparent that the lower court misapplied the basic constitutional

concept – the Petitioner was not given a reasonable opportunity to present her case from an arbitrary or unjust appropriation and defend her interest of her reputation. The Petitioner's case was never properly investigated to meet even the minimum of due process.

Under the United States Supreme Court's precedents as to whether there is a statutory or constitutional right to a jury trial on a civil claim under a federal statute, before the court inquiries into the applicability of the federal constitution's Seventh Amendment, the court must first ascertain whether a construction of the statute if fairly possible by which the constitutional question may be avoided; if there is no statute then it is a constitutional question. City of Monterey v. DelMonte Dunes, 526 U.S. 687, 119 S.Ct. 1624 (1999). Consistent with the textual mandate of the federal constitution's Seventh Amendment that the right to a jury trial be preserved in suits "at common law," the United States Supreme Court, in interpreting the Seventh Amendment, (1) asks whether the court is dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was; and (2) if the action in question belongs in the law category, then asks whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791. Id; Markman v. Westview In-

struments, Inc., 517 U.S. 370, 376, 134 L.Ed. 2d 577, 116 S.Ct. 1384 (1995).

The Petitioner's case must fall to the jury in order to preserve her substantive right of the opportunity to be heard. The Petitioner raised serious allegations against the Union, a union that represents over 45,000 members throughout the country. The Union must be held accountable and responsible to those it is suppose to serve.

CONCLUSION

For the foregoing reasons, Stacy Ann Patterson, the Petitioner, respectfully requests that this Honorable Court grant this Writ for Certiorari so that the Third Circuit and District Court follow the proper standard of proof, or in the alternative, direct the District Court to allow the case to proceed to trial, and such other relief that the Court deems just and proper.

Respectfully submitted,

Stacy Ann Patterson,
The Petitioner
Pro Se

APPENDIX

APPENDIX A – SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC, DATED, APRIL 23, 2009

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-2597

STACY ANN PATTERSON,
Appellant

v.

AFSCME #2456

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 1:07-cv-00965)
District Judge: Honorable Malachy E. Mannion

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

Present: SCIRICA, Chief Judge, SLOVITER, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, and VAN ANTWERPEN*, Circuit Judges,

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied..

By the Court,

/s/ Kent A. Jordan
Circuit Judge

Dated: April 23, 2009
CRG/cc: Stacy Ann Patterson
Elizabeth Farry, Esq.
Alaine S. Williams, Esq.

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* Judge Van Antwerpen's vote is limited to panel rehearing only.

APPENDIX B – JUDGMENT, DATED MARCH 26, 2009

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-2597

STACY ANN PATTERSON,
Appellant

v.

AFSCME #2456

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 1:07-cv-00965)
District Judge: Honorable Malachy E. Mannion

Submitted Pursuant to Third Circuit LAR 34.1(a)
March 26, 2009
Before: FISHER, JORDAN and VAN ANTWERPEN,
Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Middle District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on March 26, 2009. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered May 14, 2008, be and the same is hereby affirmed. All of the above in accordance with the opinion of the Court.

ATTEST:

/s/ Marcia M. Waldron

Clerk

Dated: March 26, 2009

APPENDIX C – JUDGMENT IN A CIVIL CASE, DATED MAY 14, 2008

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF PENNSYLVANIA

JUDGMENT IN A CIVIL CASE

Case Number: 1:07-cv-0965

STACY ANN PATTERSON

V.

AFSCME #2456

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That Judgment be and hereby is entered in favor of the defendant AFSCME #2456 and against the plaintiff Stacy Ann Patterson per memorandum and order entered today.

May 14, 2008 Mary E. D'Andrea

APPENDIX D - MEMORANDUM, DATED MAY 14, 2008

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

STACY ANN PATTERSON,

Plaintiff

v. Civil Action No. 1:07-0965

(Mannion, M.J.)

AFSCME #2456

Defendant.

MEMORANDUM

Pending before the court is the defendant's motion for summary judgment filed on February 6, 2008. (Doc. No. 32). Based upon the court's review of the record in this case, the defendant's motion will be granted.

I. PROCEDURAL HISTORY

By way of relevant background, on May 25, 2007, the plaintiff filed the instant employment discrimination action, pro se. (Doc. No. 1). The court considers the plaintiff's complaint pursuant to the Pennsylvania Human Relations Act, ("PHRA"), 43

Pa.Cons.Stat.ann. §§ 12101, et seq.; the Americans with Disabilities Act, ("ADA"), 42 U.S.C. §12101, et seq.; and Title VII of the Civil Rights Act of 1964, 42 U.S.c. §§2000e-1 et seq[1][2] The matter was originally

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[1] The plaintiff's complaint in this action, which lists only the PHRA as a basis for jurisdiction, appears to be a copy of the complaint which she had filed against the defendant with the Pennsylvania Human Rights Commission, ("PHRC"). That complaint was dual filed with the U.S. Equal Employment Opportunity Commission, ("EEOC"). (Doc. No. 1 Attachments). The EEOC adopted the PHRC's findings dismissing the plaintiff's discrimination claim and issued the plaintiff a right to sue letter on May 9, 2007. (Id.). Originally, although the plaintiff had only listed the PHRA as a basis for this court's jurisdiction, because of the plaintiff's pro se status, the court liberally construed the plaintiff's complaint as being filed pursuant to the PHRA and the ADA. The plaintiff later filed documents in which she referred to her action as a "Title VII action," and indicated that she is "...seeking relief under Title VII of the Civil Rights Acton of 1964..." Again, because of the plaintiff's pro se status, the court will also consider the plaintiff's action pursuant to Title VII. The defendant has also considered the plaintiff's claim in context of Title VII in their motion for summary judgment. (Doc. No. 24, p.31).

[2] The court notes that the plaintiff had filed a previous action against her former employer, the Pennsylvania Office of the Inspector General, ("OIG"), claiming that the OIG discriminated against her by denying her training in

assigned to the Honorable Christopher C. Conner. On August 3, 2007, the defendant filed an answer to the plaintiff's complaint. (Doc. No. 11). By order dated September 6, 2007, the case was reassigned to the undersigned, the parties having consented to proceed before a United States Magistrate Judge pursuant to 28 U.S.C. § (c)(1). (Doc.No.15).

Subsequent to the close of discovery, on February 6, 2008, the defendant filed the instant motion for summary judgment, along with supporting materials. (Doc. Nos. 23 &24). The plaintiff was granted an extension of time to respond to the defendant's motion, (Doc. No. 26), and did so on March 19, 2008, (Doc. Nos. 27 & 28). The plaintiff filed a supplemental response to the defendant's motion on April 8, 2008. (Doc. No.30). A reply brief was filed by the defendant on April 10, 2008. (Doc. No. 31).

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violation of the PHRA. See Civil Action No. 1:05-2549. By order dated August 23, 2006, this court dismissed the plaintiff's action pursuant to Federal Rule of Civil Procedure 12(b)(6) on the basis that a suit against the OIG for violation of the PHRA was barred by the Eleventh Amendment. The plaintiff appealed the decision to the United States Court of Appeals for the Third Circuit, which affirmed by opinion dated June 15, 2007. See Patterson v. Pa. Office of Inspector General, 243 Fed.Appx. 695 (3d Cir.(Pa.) 2007).

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the "pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

The Supreme Court has stated that:

> "...[T]he plaint language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof."

Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986).

The moving party bears the initial responsibility of stating the basis for its motion and indentifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Id.* The moving party can discharge that burden by "showing...that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325.

Issues of fact are genuine "only if a reasonably jury, considering the evidence presented, could find for the nonmoving party." Childrers v. Joseph, 842 F.2d 689, 693094 (3d Cir. 1988) (citations omitted). Material facts are those which will effect the outcome of the trial under governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The court may not weigh the evidence or make credibility determinations. Boyle v. County of Allegheny, 139 F.3d 386, 393 (3d Cir. 1998). In determining whether an issue of material fact exists, the court must consider all evidence and inferences drawn therefrom in the light most favorable to the nonmoving party. *Id.*at 393.

If the moving party meets his initial burden, the opposing party must do more than raise some metaphysical doubt as to material facts, but must show sufficient evidence to support a jury verdict in its favor. *Id.*

III. DISCUSSION

In her complaint, the plaintiff alleges that she became employed by the Commonwealth of Pennsylva-

nia's Commission on Crime and Delinquency, ("PCCD"), in 1996. (Doc. No.1, ¶4). Shortly thereafter, in 1997, she became a member of PCCD's union. (Doc. No.1, ¶5).

On January 18, 2000, the plaintiff began a lateral position as an Information Technology Technician, ("ITT"), at the OIG. (Doc. No. 1¶6).

The plaintiff brings the instant action alleging that the defendant union, AFSCME #2456, discriminated against her in its representation of her with respect to various grievances filed during her employment with the OIG[3] The plaintiff alleges that she filed at least eight grievances during her employment with the OIG, all of which were improperly handled by the defendant. (Doc. No.1, ¶44). Initially, the plaintiff claims that Grievance No. 1365, relating to her improper classification as "Information Technology Technician," was filed by the defendant on November 6, 2001, after which she did not hearing anything about the grievance. (Doc. No. 1, ¶¶45(i)).

At around the same time, on November 13, 2001, the plaintiff alleges that the defendant attempted to

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[3] The plaintiff provides several pages of information relating to her employment and incidents which occurred during her employment at the OIG. (See Doc. No. 1, ¶¶7-43). However, for purposes of the instant memorandum, only the substantive allegations against AFSCME are set forth.

coerce her into accepting a "demotion" to a job title which she was not capable of performing. (Doc. No. 1 ¶48, 58).

According to the plaintiff, Grievance No. 1385 was filed by the defendant on February 5, 2002, relating to a written reprimand she received on January 31, 2002, which was alleged to be in violation of the collective bargaining agreement. The plaintiff claims that she received a copy of a letter dated January 14, 2003, from Bill Brenner, Council 89 Staff Representative, to Tim Clapham, Office of Administration, indicating that the grievance was being withdrawn "without prejudice or precedence." (Doc. No. 1¶45(ii)).

Next, the plaintiff claims that Grievance No. 1407 was filed on her behalf by the defendant on June 14, 2002, relating to a one-day in-house suspension issued to her by her supervisor, Bill Barrett, in violation of the collective bargaining agreement. According to the plaintiff, there was a first-step grievance hearing on July 11, 2002, after which she did not receive any additional information on the grievance. (Doc. No. 1, ¶45(iii)).

The plaintiff alleges that Grievance No. 1421 was filed by the defendant on August 5, 2002, relating to a five-day in-house suspension issued to her by her supervisor, Bill Bar- rett. This grievance was heard at a first-step grievance hearing on February 26, 2003, which was a combined hearing for the five-day

suspension and her subsequent termination. The plaintiff alleges that she received a letter from the defendant dated August 21, 2003, stating that the grievance was denied and would not be moved to arbitration. (Doc. No. 1, ¶45(iv)).

With respect to the final specific grievance cited by the plaintiff, she alleges that Grievance No. 1464 was filed in relation to a termination letter issued to her on October 2, 2002. The grievance was heard at the first-step grievance hearing on February 26, 2003, previously referenced. The plaintiff alleges that the grievance proceeded to AFSCME's Eastern Joint District Committee Panel on May 5, 2003, which ended in a "deadlock" decision. The grievance was then heard by AFSCME's State Committee Panel on July 30, 2003, which resulted in the Committee ruling that management had "just cause" to terminate the plaintiff for "unsatisfactory performance." The plaintiff alleges that she received a letter on August 22, 2003, which informed her of the decision and indicated that she could turn the termination into a resignation. (Doc. No. 1¶45(v)).

In another instance, the plaintiff alleges that at grievance was settled on her behalf before it was filed. (Doc. No. ¶47). Here, she claims that a grievance should have been filed with respect to a "new procedure" which was used to introduce her interim performance evaluation for the rating period of May 13, 2002, through July 12, 2002. The plaintiff alleges that Bill Brenner, Council 89 Staff Representa-

tive, called her at home and told her that the defendant would no longer represent her in her grievances against the OIG. (Doc. No. 1, ¶59.). At that time, the plaintiff claims that he also informed her that the defendant decided not to go to arbitration regarding her termination grievance and that she would receive notification of everything via mail. (Doc. No. I, ¶¶60-61). On August 22, 2003, the plaintiff alleges that she received a document in the mail which stated that her grievances were denied by AFSCME's State committee Panel with no other explanation. (Doc. No. 1, ¶63).

As the basis for her discrimination claim, the plaintiff alleges that she suffers from hydrocephalus[4], a neurological condition with which she was diagnosed at the age of seven. (Doc. No. 1, ¶¶49-51).

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[4] Hydrocephalus is a accumulation of excessive amounts of cerebrospinal fluid (CSF) within the ventricles of the brain, resulting from blockage or destruction of the normal channels of CSF drainage. Common causes include congenital lesion, (e.g., spina bifida or aqueductal stenosis), traumatic lesions, neoplastic lesions, and infections such as meningoencephalitis. Sometimes the accumulated fluid leads to increased intracranial pressures. In congential hydrocephalus, the faulty drainage of CSF from the ventricles of the brain often results in malformation of the skull and abnormal development of the psychomotor and cognitive or language skills. Taber's Cyclopedic Medical Dictionary at 970 (19th ed. 2001).

The plaintiff alleges that her hydrocephalus has caused her to have permanent visual difficulties with "no depth perception negating through surroundings." (Doc. No. 1, ¶52). She further alleges that she suffers from Post Concussion syndrome as a result of a car accident on April 7, 1998, which causes her to have problems with handling simultaneous multiple tasks requiring divided attention and with short term memory. (Doc. No.1, ¶¶ 16, 49, 54-55).

According to the plaintiff, representatives of the defendant knew of her medical conditions. Specifically, she alleges that she informed Ron Aitken, the Chief Union Steward, of her conditions in 1999, when she filed a grievance while employed at PCCD. (Doc. No.1, ¶56(i)). She further alleges that she informed Joe Koshinskie, Assistant Chief Union Steward, of her conditions in 2000, when she was considering filing a grievance against OIG management. (Doc.No.1, ¶56(ii)). The plaintiff alleges that Mike McCarron, Union Steward, knew of her cerebral concussion in 2001 when he attended a meeting with the Reviewing Officer. (Doc. No. 1, ¶(iii)). The plaintiff claims that the defendant "officially" learned of her conditions on November 13, 2001, when she met with Barry Walker, AFSCME Council 89 Staff Representative, Art Reed, President of AFSCME local 2456, and Ron Aitken on-site at the OIG's main headquarters. At this time, she indicates that she showed the individuals an e-mail sent

to her former supervisor which explained the details of her medical conditions. (Doc. No. 1, ¶56(iv)).

Finally, according to the plaintiff, a co-worker, Lynn Croman, without any perceived disabilities, filed a grievance regarding her unsatisfactory interim performance reviews and the defendant represented her to the point of arbitration and securing a lateral transfer. (Doc. No. 1, ¶64). The plaintiff concludes that the defendant's actions with respect to her own grievances were due to her "perceived disabilities." (Doc. No.1, ¶65).

In an attempt to demonstrate that there are no genuine issues of material fact for trial, the defendant has provided a statement of material facts, the following of which are supported by the record and uncontroverted.[5] The American Federation of State, County and Municipal District Council Employees, ("AFSCME"), Council 13, is the collective bargaining representative for approximately 45,000 employees of the Commonwealth of Pennsylvania in numerous

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[5] As noted by the defendant, contrary to Local Rule 56.1, the plaintiff has failed to file with the court a separate, short and concise statement of material facts responding to the statement of facts filed by defendant. However, because of the plaintiff's pro se status, the court has reviewed the materials supplied by the plaintiff to determine which of the material facts provided by the defendant are properly opposed.

bargaining units represented both directly and indirectly through its affiliated locals and district councils. (Doc. No. 23, Ex.2, ¶2; Ex. 3, ¶2; Ex. 4, ¶2; Ex. 5, ¶2[6]).

Defendant AFSCME 2456 and AFSCME District Council 89 are subordinate bodies of Council 13 and represent a bargaining unit of many professional employees working for the Commonwealth, including employees such as the plaintiff, who worked at the PCCD and OIG. (Doc. No. 23, Ex. 1, pp.5, 37-38; Ex.2, ¶¶2, 6; Ex.3, ¶¶2, 6: Ex.4, ¶¶2.6).

During the time relevant to the plaintiff's complaint, the wages, hours and terms and conditions of employment of Commonwealth employees in bargaining units represented by Council 13 were set forth in a collective bargaining agreement entitled "Master Agreement "99-03 between the Commonwealth of Pennsylvania and Council 13, American Federation of State, County, and Municipal Employees, AFL-CIO, " ("Master Agreement'). (Doc. No.23, Ex.1, pp.44-45; Ex.2, ¶3; Ex. 3, ¶3; Ex.4, ¶3; Ex. 5, ¶3).

The Master Agreement contains, among other provisions, a provision setting forth the grievance

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[6] For sake of clarity, the court will use the same exhibit numbering systems as set forth in the defendant's materials. However, cross-referenced exhibits are not cited herein.

procedure for resolving disputes arising under the Agreement. Disputes arising under the Master Agreement that involved bargaining unit members represented by the defendant were subject to resolution through the four-step Accelerated Grievance Procedure, ("AGP"), set forth in Article 38 and Appendix G of the Master Agreement. (Doc. No. 23, Ex. 1, pp.44-46; Ex. 2, ¶4; Ex. 3,¶4).

At the first step of AGP, either the union or a bargaining unit member would file a grievance in writing to the Commonwealth employer, after which a first-step hearing would be held. If the first-step hearing did not resolve the matter, the union or member could pursue the grievance to the second step, which would be a hearing before either the East or West Joint Are Committee, ("JAC"). Each JAC is comprised of an equal number of labor and management representatives. Decisions of a JAC, which require a majority vote, are final and binding, meaning that they cannot be grieved any further. However, in the event that a JAC deadlocked with respect to the disposition of the grievance, the grievance would then move to the third step. At the third step, the grievance would be herd by the Joint State Committee, ("JSC"), which is also comprised of an equal number of labor and management representatives. The decision of the JSC is final and binding. Pursuant to the AGP, a grievance may only proceed to the fourth step, arbitration, where the JSC deadlocked with respect to the proper disposition of the

grievance. (Doc. No. 23, Ex. 2, ¶5; Ex.3, ¶5; Ex. 4, ¶5; Ex. 5, ¶5).

The defendant's materials established that plaintiff began her employment at the PCCD in 1996. (Doc. No. 23, Ex.1, pp. 10-11). She was later transferred to the position of ITT.[7] (Doc. No. 23, Ex. 1, p. 11).

In 1997, the plaintiff joined the Union[8]. (Doc. No.23, Ex.1, pp. 36-37). In 1999, the defendant filed Grievance No. 1179 on the plaintiffs behalf which challenged how her lunch breaks were scheduled. (Doc. No. 23, Ex.1, pp. 102-03; Ex.2, ¶10). Around the time that this grievance was filed, the plaintiff sought the Union's assistance in having her transferred to another Commonwealth work-site. (Doc. No. 23, Ex. 1, pp. 42-43, 107, 115; Ex. 4, ¶7). In January 2000, the plaintiff was transferred to the OIG. (Doc. No. 23, Ex. 1, pp. 10-11; Ex. 2, ¶10; Ex. 4, ¶7). As a result of her transfer, Grievance No. 1179 was withdrawn as moot. (Doc. No. 23, Ex. 1, p. 115; Ex. 2, ¶10).

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[7] The defendant refers to this transfer as a promotion. Although the plaintiff received a pay increase, she claims that this transfer was not a "promotion," but a reclassification of her position. (Doc. No. 30, p.5).

[8] The court uses the terms "defendant" and "Union" interchangeably throughout this memorandum.

During her employ with OIG, the defendant filed at least eight grievances on the plaintiff's behalf. (Doc. No. 23, Ex.1, pp. 25, 120; Ex. 2, ¶ ¶9-17). On or about May 25, 2001, Grievance No. 1318 was filed which alleged that the Commonwealth employed ambiguous performance standards for evaluating the plaintiff. On or about July 25, 2001, Grievance No. 1331 was filed which alleged harassment on the part of the Commonwealth through its issuance of poor evaluations of the plaintiff. On or about August 21, 2001, Grievance No. 1335 was filed which challenged a verbal reprimand issued to the plaintiff for poor work performance. (Doc. No. 23, Ex. 1, pp. 63-65; Ex. 2, ¶11).

On or about November 13, 2001, the plaintiff attended a meeting with Art Reede, the President of Local 2456, Ron Aitken, the former Chief Shop Steward to Local 2456, and Barry Walker, the former Assistant Director of District Council 89. The plaintiff was presented with a proposal to settle the above three grievances, as well as an unfair labor practice charge filed on her behalf in the Fall of 2001 to challenge the Commonwealth's retaliation against her after she reported being sexually harassed by her former supervisor, Bernie Ortiz.[9] (Doc. No. 23, Ex.1 pp. 63-65, 96-98; Ex. 4, ¶¶ 1, 10, 11). As part of the

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[9] In her complaint and opposing materials, the plaintiff characterizes this proposal as an attempt to "coerce" her into taking a position for which she was not qualified.

settlement offer, the Commonwealth offered to reclassify the plaintiff as a Clerk Typist III with no loss of salary or benefits and with the opportunity for training that would facilitate her return to the title of ITT with a possible increase in pay. (Doc. No. 23, Ex. 1, pp. 63-65, 96-98; Ex.4, ¶ 12). The plaintiff refused the offer and, as a result, the defendant settled the above grievances on other grounds providing for reduced discipline of the plaintiff. (Doc. No. 23, Ex.1, pp. 63-65, 95; Ex. 2, ¶ 12; Ex. 3, ¶14).

In the meantime, on or about November 5, 2001, the defendant also processed Grievance no. 1365 which challenged the Commonwealth's failure to promoted and place the plaintiff in the proper job classification. The defendant later withdrew this grievance as being without merit based upon the fact that the Commonwealth has full discretion to promote employees and place them in certain job classifications. (Doc. No. 23, Ex. 2, ¶13).

In addition to the grievances filed on her behalf in 2001, the plaintiff received other assistance from the defendant in 2001 in the form of filing a discrimination charge with PHRC against the Commonwealth for its unsatisfactory work evaluations. (Doc. No. 23, Ex. 1, pp. 22-25).

In 2002, the defendant filed two grievances on the plaintiff's behalf, including Grievance No. 1385 filed on February 2, 2002, and Grievance No. 1407 filed on June 13, 2002. Grievance No. 1385 alleged that

the plaintiff's supervisor improperly imposed a written reprimand for her poor job performance, while Grievance No. 1407 alleged that the plaintiff was improperly issued a one-day suspension for poor job performance. Both grievances received a first-step hearing under the AGP. However, based upon the hearing with the Commonwealth, as well as the Union's own investigation, both grievances were withdrawn by the defendant as being without merit. (Doc. No. 23, Ex.3, ¶ ¶1, 8-10). The plaintiff was informed that the grievances were withdrawn by letter dated January 14, 2003. (Doc. No. 23, Ex.3, ¶ 10).

On August 2, 2002, the plaintiff was issued a five-day suspension for poor work performance. (Doc. No. 23, Ex. 1, pp. 55056; Ex. 2, ¶16; Ex. 3, ¶11; Ex. 4, ¶15). The defendant filed a grievance on the plaintiff's behalf on August 5, 2002, challenging her suspension. (Doc. No. 23, Ex. 1, p. 57; Ex. 2, ¶ 16; Ex. 3, ¶11 Ex. 4, ¶ 15).

By letter dated October 2, 2002, the plaintiff was notified that she was terminated, effective October 16, 2002, for poor work performance. (Doc. No. 23, Ex.1, pp. 58-59; Ex. 2, ¶ 16; Ex. 3, ¶12; Ex. 4, ¶15).

The first-step hearing for the consolidated grievances was scheduled for February 26, 2003. (Doc. No. 23, Ex.1, pp. 67-68; Ex. 2, ¶17; Ex. 3, ¶13, Ex. 4, ¶16). The plaintiff met with Mr. Brenner, Mr. Reede, Mr. Aiken, and Mr. Koshinkskie on the prior day to prepare for the hearing. The plaintiff was informed

about the AGP process, and the role of Mr. Brenner as Staff Representative. The evidence in support of the grievances, referred to as the "grievance packet," was discussed. This grievance packet consisted of materials provided by the plaintiff, including sixty-nine pages of eight separate witness statements written by the plaintiff attesting to her account of the events at issue which she believed to be relevant.[10] (Doc. No. 23, Ex. 1, pp. 47, 68, 86, 89-94; Ex.3, ¶16).

On February 26, 2003, Mr. Brenner and the first-step hearing, at which Mr. Brenner presented the Union's case in support of the grievances, including the grievance packet. At the hearing, the plaintiff was also called upon to answer a number of questions posed by the Commonwealth's representatives. (Doc. No. 23, Ex. 1-8; Ex. 3, ¶ 17). By letter dated March 19, 2003, the Commonwealth denied the grievances at the first step. (Doc. No. 23, Ex.1-8; Ex. 3, ¶18).

By letter dated March 24, 2003, the defendant advanced the grievances to the second step of the AGP before the Eastern JAC. (Doc. No. 23, Ex.3, ¶19). Mr.

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[10] The defendant concedes that not all information provided by the plaintiff was included in the packet, including information which it deemed was untimely, redundant, or did not support the grievances. (Doc. No. 23, Ex. 3¶¶29-30).

Brenner presented the defendant's case, which included the grievance packet, to the Eastern JAC panel on May 6, 2003. The plaintiff did not attend his hearing[11] (Doc. No. 23, Ex. 1, p. 71; Ex.3, ¶21).

Ultimately, the Eastern JAC was unable to reach a decision by a majority vote and deadlocked. The plaintiff was informed of the outcome, as well as the fact that the defendant would be advancing the grievances to the JSC. (Doc. No. 23, Ex. 1, pp. 47-48, 68-71; Ex. 3, ¶22).

The JSC hearing was held on July 30, 2003, at which Mr. Brenner presented the grievance packet and argued that there was no just cause to suspend or terminate the plaintiff. The plaintiff did not attend the JSC hearing.[12] (Doc. No. 23, Ex. 1, p. 47; Ex. 3, ¶24). On the same day, the JSC unanimously denied the grievances, finding that the Commonwealth had just cause to suspend and terminate the plaintiff. However, the JSC offered the plaintiff the opportunity to convert her termination to a voluntary resignation. (Doc. No. 23, Ex. 3, ¶25). Because the

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[11] The plaintiff does not dispute that she did not attend the hearing, but claims that this was due to the fact that she was not invited to attend. (Doc. No. 30, p.9). This claim is immaterial as the JAC and JSC have the discretion to hear and decide a case without notice to the grievant. (Doc. No. 23, Ex. 2-A, p. 235).

[12] See n. 11

JSC did not deadlock, the defendant was not permitted to advance the grievances to an arbitrator under the AGP. (Doc. No. 23, Ex. 2, ¶¶ 5, 17, 18; Ex. 3, ¶¶ 5, 25, 26).

On July 30, 2003, Mr. Brenner informed the plaintiff of the JSC's decision and its offer regarding the conversion of her termination to a resignation. He further informed the plaintiff that the JSC's decision was final and binding. (Doc. No. 23, Ex.1, pp. 47-48, 84-85; Ex.3, ¶27).

By letter dated August 21, 2003, Mr. Brenner provided the plaintiff with the JSC's decision denying the grievances. (Doc. No. 23, Ex. 1-11; Ex. 3, ¶28). The plaintiff did not accept the JSC's offer to convert her termination to a resignation. (Doc. No. 23, Ex. 3, ¶27).

In 2002, the defendant's materials provide that Lynn Croman, a Clerk Typist 2 at the Systems Development Support Department, ("SDS"), of the OIG, was a member of the bargaining unit represented by Local 1420 and District Council 90, not the defendant. (Doc. No. 23, Ex. 1, pp. 116-17; Ex. 5, ¶8). On or about November 20, 2002, Ms. Croman received an overall unsatisfactory interim performance evaluation for the period September 2002 through November 2002. Ms. Croman disagreed with the evaluation. (Doc. No. 23, Ex. 5, ¶11).

In December 2002, Ms. Croman received a letter of alternative discipline in lieu of suspension without

pay for her alleged continued unsatisfactory work performance. (Doc. 23, Ex. 5, ¶12). The Union, Local 1420, filed a grievance on behalf of Ms Croman challenging the letter of alternative discipline. (Doc. No. 23, Ex. 5, ¶13). That same day, Ms. Croman requested a lateral transfer from her position as a Clerk Typist 2 at the SDS to another work-site. In her letter, Ms. Croman claimed that she would be unable to perform her job duties at an acceptable level at SDS. (Doc. No. 23, Ex. 1, pp. 115-18; Ex. 5, ¶14). Nichelle Chivis, a Staff Representative for District council 90, worked with the Commonwealth to arrange for Ms. Croman's requested transfer. Ultimately, Ms. Chivis found another individual in a Clerk Typist 2 position at the Bureau of Fraud Prevention and Prosecution, ("BFPP"), at the OIG, who was willing to vacate her position for Ms. Croman. (Doc. No. 23, Ex. 5, ¶¶ 15-18). As a result, the Union and the Commonwealth agreed to settle the grievance filed on behalf of Ms. Croman. As part of the settlement, Ms. Croman was reassigned to the newly vacated Clerk Typist 2 position at BFPP. However, Ms. Croman's disciplinary letter remained in her personnel file and management continued to monitor her performance and was entitled to conduct interim evaluations as needed. (Doc. No. 23, Ex. 5, ¶19). Because the grievance was settled, a first-step hearing under the AGP did not take place, (Doc. No. 23, Ex. 5, ¶20).

Finally, the defendant's materials provide the Union officials had knowledge that the plaintiff suffered from certain medical conditions and that in the late 1990s she was in a car accident and suffered from some physical ailments as a result of the accident. However, the defendant's materials provide that Union officials did not regard the plaintiff as disabled. (Doc. No. 23, Ex. 3, ¶17).

In response to the defendant's materials, the plaintiff filed the several documents. Initially, she filed the amended complaint filed in her previous civil action for employment discrimination pursuant to the PHRA against the OIG.[13] In addition, she filed a copy of her deposition transcript with attached exhibits.[14] Finally, she provided copies of Employee Performance Reviews for the rating periods of July 1995 to June 1996; February 1996 to August 1996; and July 1996 to June 1997. As discussed below, these documents are insufficient to refute the defendant's materials and establish that a genuine issue of fact exists for trial.

Initially, the defendant argues that because the plaintiff filed her complaint with the PHRC on January 12, 2004, she is limited to challenging its repre-

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[13] See n.2

[14] These exhibits were provided by the defendant in support of its motion for summary judgment. See Doc. No. 23, Ex. 1.

sentation of her to the last grievances heard before the JSC on July 30, 2003, by virtue of the applicable statute of limitations under the ADA and PHRA.

In order to determine which events the plaintiff may rely on to support her ADA and PHRA claims, the court must review the various statues of limitations which apply to her claims. In Pennsylvania, charges of disability discrimination under the ADA must be filed with EEOC within 300 days of the alleged unlawful employment practice. *Bullock v. City of Philadelphia,* 250 Fed.Appx. 512 (3d Cir. (Pa.) 2007)(citing *Watson v. Eastman Kodak Co.*, 235 F.3d 851, 854 (3d Cir.2000); 42 U.S.C. §12117(a)). Claims filed under the PHRA must be filed with the PHRC within 180 days after the alleged act of discrimination. 43 Pa. Cons.Stat. § 959(g).

The plaintiff filed her charge of discrimination with the PHRC, which was dual filed with the EEOC, on January 12, 2004. (Doc. No. 23, Ex.1, p.32). As a result, to prevail on her ADA claim, the plaintiff may only point to alleged discriminatory acts which occurred on or after March 19, 2003, 300 days before she filed her charge of discrimination. Under the PHRA, she may only rely on events that occurred on or after July 17, 2003, 180 days before her administrative filing.

In her opposing materials, the plaintiff does not contest the filing dates or applicable statutes of limitations raised by the defendant. Further, she raises

no claim that equitable tolling should apply to her claims. Therefore, the court finds that the plaintiff is limited to challenging its representation of her to the last two grievances filed concerning her five-day suspension and termination.

In considering the plaintiff's ADA and PHRA[15] claims, the ADA provides:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a).

Because there is no direct evidence of discrimination in this case, the analytical burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) applies to the plaintiff's ADA and

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[15] The "analysis of an ADA claim applies equally to a PHRA claims." *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 306 (3d Cir. 1999) (citing *Kelly v. Drexel Univ.*, 94 F.3d 102, 105 (3d. Cir. 1996)). Therefore, the court will consider both claims together. *Cf. William v. Pennsylvania Hous. Auth. Police Dep't.* , 380 F.3d 751, 761 n.6 (3d Cir. 2004).

PHRA claims. *See Shaner v. Synthes,* 204 F.3d 494, 500 (3d Cir. 2000); *Walton v. Mental Health Ass'n of Southeaster Pennsylvania,* 168 F.3d 661, 668 (3d Cir. 1999). Therefore, to establish her claims, the plaintiff has the burden of first establishing a *prima facie* case of discrimination by showing: (1) she is a disabled person within the meaning of the ADA: (2) she is otherwise qualified to perform the essential functions of the job; and (3) she has suffered an otherwise adverse employment decision as a result of discrimination. *Turner v. Hershey Chocolate U.S.,* 440 F.3d 604 (3d Cir. 2006) (citing *Buskirk v. Apollo Metals,* 307 F.3d 160, 166 (3d Cir. 2002); *Gaul v. Lucent Techonologies, Inc.,* 134 F.3d 576, 580 (3d Cir. 1998)).[16]

If the plaintiff successfully establishes a *prima facie* case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the adverse action. *See Fuentes v. Perskie,* 32 F.3d 759, 763 (3d Cir. 1994). If the defendant can articulate such a reason, the burden shifts back to the

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[16] Although the cases cited herein setting forth the *prima facie* elements of a discrimination claim, as well as the application of those elements, relate to claims of discrimination against an employer, they apply equally to the defendant labor union which is also considered a "covered entity" under the ADA. See 42 U.S.C. § 12112(b)(2).

plaintiff, who must produce "sufficient evidence to raise a genuine issue of fact as to whether the [defendant's] proffered reasons were not its true reasons for the challenged employment actions." *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1067 (3d Cir. 1996).

The defendant argues that the plaintiff's ADA and PHRA claims must fail because she cannot establish the first and third prongs of the *prima facie* analysis. With respect to the first prong, (i.e., that the plaintiff is a disabled individual within the meaning of the ADA), the ADA defines a "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) having a record of such impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

Here, while the plaintiff does not specify in her complaint the subsection upon which she relies in claiming that she is disabled under the ADA, she testified at her deposition that she is claiming the defendant discriminated against her because of her "perceived disabilities." The plaintiff further testified that none of her physicians have opined that her conditions constitute disabilities. (Doc. No. 23, Ex. 1, p. 127). As such, it would appear that the plaintiff is basing her claim of disability upon subsection (C). In the instant motion for summary judgment, the defendant has made the same assumption and analyzed the plaintiff's claim under subsection (C). The

plaintiff does not argue otherwise in her opposing brief.

Under subsection (C), the plaintiff would be "regarded as having such an impairment" if she: (1) has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation; (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (3) has none of the impairments defined in paragraph (h)(1) or (2) of this section [defining "physical or mental impairment"] but is treated by a covered entity as having a substantially limiting impairment. 29 C.F.R. § 1630.2(i); *see also Buskirk v. Apollo Metals,* 307 F.3d 160, 166-67 (3d Cir. 2002) (quoting and applying this definition.)

In order to determine whether the defendant regarded the plaintiff as disabled, we must consider the information that the defendant had regarding the plaintiff's condition and its response to that information, as "[t]he analysis "focuses not on [the plaintiff] and [her] actual disabilities, but rather on the reactions and perceptions of the persons interacting or working with [her]." *Kelly v. Drexel Univ.,* 94 F.23d 102, 108-09 (3d Cir. 1996) (stating that the "mere fact that [the defendant] is aware of an employee's impairment is insufficient to demonstrate...that the [defendant] regarded the employee as disabled") "[I]n general, [a defendant's] perception

that an employee cannot perform a wide range of jobs suffices to make out a 'regarded as' claim." *Taylor v. Pathmark Stores, Inc.*,177 F.3d 180, 188 (3d Cir. 1999).

Here, there is no dispute that the plaintiff has medical conditions, including hydrocephalus and Post Concussion Syndrome. There is also no dispute that Union officials knew of the plaintiff's conditions. However, as stated above, the mere fact that Union officials knew of the plaintiff's impairments is insufficient to demonstrate that the Union regarded her as disabled. Instead, it is how the Union reacted to or acted in the face of this knowledge which is of importance. Although the Union knew of the plaintiff's medical conditions, the record demonstrates that the Union filed numerous grievances on the plaintiff's behalf seeking to challenge disciplinary action taken against her and to maintain her employment. Of relevance here, the Union represented the plaintiff with respect to her five-day suspension and subsequent termination to the full extent allowed by the AGP. These actions are not indicative that the Union believed the plaintiff to be substantially limited in any major life activity or unable to perform a wide range of jobs. To the contrary, the Union's attempts at maintaining the plaintiff's employment is indicative that the Union believed she was, in fact, capable of performing her work. There is noting in the record to indicate to the contrary.

Moreover, under the third prong of the *prima facie* analysis, the plaintiff must establish that she suffered adverse action as a result of discrimination.

Here, the plaintiff claims that the adverse action was the defendant's failure to take her consolidated grievances relating to her five-day suspension and termination to arbitration. There is no evidence on the record to demonstrate that the defendant's failure to do so was the result of discrimination. Instead, the record demonstrates that the defendant failed to take the plaintiff's grievance to arbitration because it was barred from doing so by the AGP, as the JSC did not deadlock and had unanimously decided that the plaintiff's suspension and termination were supported by just cause.

In light of the above, the court finds that the plaintiff has failed to establish a *prima facie* case under the ADA and PHRA. Based upon this finding, the court need not proceed with the remaining McDonnell Douglas analysis. Therefore, the defendant's motion will be granted with respect to the plaintiff's ADA and PHRA claims.

To the extent that the plaintiff is seeking relief pursuant to Title VII[17], in enacting Title VII, Congress intended to prohibit all practices in whatever form which create inequality in employment oppor-

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[17] Title VII also authorizes a cause of action against labor organizations. See 42 U.S.C. §2000e-2.

tunity due to discrimination on the basis of race, religion, sex, or national origin. *See Alexander v. Gardner-Denver Co.*,415 U.S. 36 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971).

In her complaint, the plaintiff alleges that "[her] protected class is Perceived Disability Hydrocephalus and Post Concussion Syndrome." (Doc. No. 1¶57). Disability is not a protected trait under Title VII. *See* 42 U.S.C. §2000e-2; *Gurmankin v. Costanzo*, 626 F.2d 1115, 1127 (3d Cir. 1980).

Moreover, the plaintiff states in her complaint and deposition testimony that she had an "intimate" relationship with her former supervisor, Bernie Ortiz, (Doc. No. 1, ¶23), and that the Union retaliated against her for blowing the whistle on Mr. Ortiz for sexual harassment, (Doc. No. 23, Ex. 1, p.143). The plaintiff claims that, after she blew the whistle on Mr. Ortiz, there was an internal investigation and Mr. Ortiz was forced to retire. The plaintiff states in her deposition testimony that the Union assisted the Commonwealth in retaliating against her for blowing the whistle on Mr. Ortiz "[b]y not fighting for [her]." (Id.)

Title VII makes it an unlawful employment practice for a labor union to retaliate against a member. 42 U.S.C. §2000e-3(a). To establish a *prima facie* case of retaliation, the plaintiff must demonstrate: (1) she participated in a protected activity know to

the Union: (2) she suffered an adverse employment action; and (3) a casual connection between the protected activity and the adverse employment action. *See Torres v. Pisano,* 116 F.3d 625, 639 (2d Cir. 1997), *cert denied* 522 U.S. 997 (1997); *Johnson v. Palma,* 931 F.2d 203, 207 (2d Cir. 1991).

Here, the plaintiff has provided no evidence, which would establish that her filing of the sexual harassment claim against Mr. Ortiz caused the Union not to bring her final grievances to arbitration. In fact, there is no evidence on the record other than that the Union's failure to pursue the grievances was due to its inability to do so under the AGP. Therefore, the defendant is entitled to summary judgment on the plaintiff's Title VII claim as well.

IV. CONCLUSION

Based upon the foregoing, an appropriate order shall issue granting the defendant's motion for summary judgment.

Malachy E. Mannion
United States Magistrate Judge

Dated: May 14, 2008

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

STACY ANN PATTERSON

Plaintiff, Civil Action No. 1:07-0965

v. (Mannion, M.J.)

AFSCME # 2456

Defendant.

ORDER

Based upon the memorandum issued this same day, **IT IS HEREBY ORDERED THAT:**

(1) the defendant's motion for summary judgment, **(Doc. No. 32),** is **GRANTED;** AND

(2) the order of May 5, 208 granting a stay of this action **(Doc. No. 35)** is **Vacated.**

(3) the Clerk of Court is directed to enter judgment in favor of the defendant, AFSCME #2456, against the plaintiff, Stacy Ann Patterson and close the case.

MALACHY E. MANNION
United States Magistrate Judge
Date: May 14, 2008

APPENDIX E – ORDER, DATED MAY 5, 2008

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

STACY ANN PATTERSON

Plaintiff, Civil Action No. 1:07-0965

v. (Mannion, M.J.)

AFSCME # 2456

Defendant.

ORDER

Pending before the court is the plaintiff's motion for appointment of counsel filed with the court on April 23, 2008. (Doc. No. 32).

By way of background, on May 25, 2007, the plaintiff filed the instant employment discrimination action, which was originally assigned to the Honorable Christopher C. Conner. (Doc. No. 1). On August 3, 2007, the defendant filed an answer to the plaintiff's complaint. (Doc. No. 11).

By order dated September 6, 2007, the case was reassigned to the undersigned, the parties having consented to proceed before a United States Magistrate Judge. (Doc. No. 15).

Subsequent to the close of discovery, on February 9, 2008, the defendant filed a motion for summary judgment, along with supporting materials. (Docs. Nos. 23 & 24). The plaintiff was granted an extension of time to respond to the defendant's motion, (Doc. No. 26), and did so on March 19, 2008, (Doc. Nos. 27 & 28). The plaintiff filed a supplemental response to the defendant's motion on April 8, 2008. (Doc. No. 30). A reply brief was filed by defendant on April 10, 2008. (Doc. No. 31).

On April 23, 2008, the plaintiff filed the instant motion for appointment of counsel, in which she indicates that she has been attempting to obtain counsel to represent her in the instant action since its filing, but has been unsuccessful. The plaintiff has provided a "partial list" of fifteen attorneys who she has contacted, but who have declined to represent her. (Doc. No. 32).

It is well established that indigent litigants have no constitutional or statutory right to appointed counsel in a civil case. *Montgomery v. Pinchak*, 294 F.3d 492, 498 (3d Cir. 2002) (citing *Parham v. Johnson*, 126 F.2d 454, 456-57 (3d Cir. 1997)). However, Congress has given the district courts broad discre-

tion to appoint counsel when deemed appropriate. See id.; 28 U.S.C. §1915(e)(1)(2006).[1] For example, appointment of counsel should be made when circumstances "indicate the likelihood of substantial prejudice to [the indigent litigant] resulting ...from [her] probable inability without such assistance to present the facts and legal issues to the court in a complex but arguably meritorious case." Ferrell v. Beard, 2006 U.S. Dist. LEXIS 63504, at 9 (M.D. Pa. Sept. 9, 2006) (quoting Smith-Bey v. Petsock, 741 F.2d 22, 26 (3d Cir. 1984)). Yet the court must always make a threshold determination of "whether the claimant's case has some arguable merit in fact and law." Montgomery, 294 F.3d at 499-500;Ferrell, at *9.

If the case is genuinely meritorious, then the court will consider a variety of factors that guide the court in deciding whether to appoint counsel. A nonexhaustive list includes:

1. the plaintiff's ability to present his or her own case;

2. the difficulty of the particular legal issues;

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[1] The Third Circuit has rejected the notion that the appointment of counsel under § 1915(e)(1) is justified only under "exceptional circumstances." *Montgomery*, 294 F.3d at 498 n.9 (internal citations omitted).

3. the degree to which factual investigation will be necessary and the ability of the plaintiff to pursue investigation;

4. the plaintiff's capacity to retain counsel on his or her own behalf;

5. the extent to which a case is likely to turn on credibility determinations, and;

6. whether the case will require testimony from expert witnesses.

Montgomery, 294 F.3d at 499 (citing *Tabron v. Grace*, 6 F.3d 147, 155-57 (3d Cir. 1993)).

In addition, the court is to consider several other practical considerations which serve to restrain a court's decision to appoint counsel in a civil case: the growing number of civil rights actions filed in federal courts by indigent litigants; the lack of funding to pay appointed counsel; and the finite pool of qualified attorneys willing to undertake assignments on a pro bono basis. See id. at 505. Yet despite these circumstances, careful analysis of the post-threshold factors will allow for the appropriate allocation of these limited legal resources. See id.

Reviewing the above factors, the court finds that appointment of counsel is not warranted in the instant action. Initially, as a threshold matter, based upon a review of the record, including documentation submitted by the parties in relation to the de-

fendant's motion for summary judgment which was fully briefed at the time the plaintiff filed the instant motion, the merits of the plaintiff's action are questionable. This is further evidence by the fact that the plaintiff has consulted with no less that fifteen attorneys all of whom have declined to represent her in this action.

Moreover, even assuming the plaintiff could get past the threshold merits requirement, thus far, the plaintiff's filings indicate that she has the ability to present the facts and legal issues of her case to the court on a *pro se* basis. A review of the record of this case suggest that the plaintiff can, given the leeway afforded to *pro se* litigants, adequately present her case and follow the applicable Rules. The plaintiff is literate and is able to communicate her thoughts to the court. Her filings have been understood by the court and they indicate that she is capable of pursuing her complaint without the benefit of appointed counsel. Finally, the issues of employment discrimination raised by plaintiff do not appear to be overly complex and will not require the testimony of expert witnesses.

On the basis of the foregoing, **IT IS HEREBY ORDERED THAT:** the plaintiff's motion for appointment of counsel, **(Doc. No. 32)**, is **DENIED.**

s/ Malachy E. Mannion
MALACHY E. MANNION
United States Magistrate Judge

Date: May 5, 2008